BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KAREN (PARTRIDGE) TATMAN	)	
Claimant	)	
VS.	)	
	)	Docket No. 202,962
IBP, INC.	)	
Respondent,	)	
Self-Insured	)	

ORDER

The respondent appealed the December 24, 1998 Award entered by Administrative Law Judge Brad E. Avery. The Director appointed Jeffrey K. Cooper of Topeka, Kansas, as Appeals Board Member Pro Tem to serve in place of Appeals Board Member Gary M. Korte, who recused himself. The Appeals Board heard oral argument on July 28, 1999.

APPEARANCES

Michael C. Helbert of Emporia, Kansas, appeared for the claimant. Jennifer L. Hoelker of Dakota City, Nebraska, appeared for the respondent.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award. Additionally, the record includes the transcript from the preliminary hearing that was held on March 14, 1996.

ISSUES

Judge Avery found that claimant sustained repetitive trauma injuries to both hands and wrists through her last day of work for the respondent on June 10, 1995, and found a 68.5 percent permanent partial general disability. In arriving at that disability rating, Judge Avery averaged a 37 percent task loss with a 100 percent difference in pre- and post-injury wages. The Judge also awarded claimant 5.57 weeks of temporary total disability benefits for the period when claimant was recovering from surgeries to both wrists.

The respondent contends the Judge erred by (1) failing to limit claimant's award to medical benefits only, (2) failing to impute a post-injury wage because claimant allegedly did not make a good faith effort to find an appropriate job after she left respondent's employment, and (3) by granting claimant temporary total disability benefits because she

allegedly did not present any evidence that she was temporarily and totally disabled due to her injuries for any period of time. The respondent requests the Appeals Board either to deny claimant all permanent partial disability benefits or to reduce the permanent partial general disability to the 8 percent whole body functional impairment rating provided by Dr. Sergio Delgado. In the alternative, it requests the work disability be reduced to 18 percent.

Conversely, claimant contends the respondent denied her appropriate medical treatment for approximately two years and, therefore, she is entitled to receive temporary total disability benefits from the time she left the company on June 10, 1995, through the date that she was allegedly finally released from treatment by Dr. John M. Quinn on December 15, 1997. In the alternative, claimant requests the Appeals Board to find that she had a 100 percent difference in pre- and post-injury wages and a 100 percent permanent partial general disability for that period. For the period after Dr. Quinn released her on December 15, 1997, claimant argues that she has, at a minimum, a 51.75 percent permanent partial general disability, which represents a 39 percent task loss and a 64.5 percent wage loss.

The only issues before the Board on this appeal are:

1. Was claimant disabled the appropriate period required by K.S.A. 44-501(c) to qualify to receive more than only medical benefits?

2. What is the nature and extent of claimant's injuries and disability?

3. For what period, if any, is claimant entitled to receive temporary total disability benefits?

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds:

1. Karen Tatman began working for IBP, Inc., a beef processor, in July 1994. During her employment with IBP, Ms. Tatman worked several different jobs on the processing floor, most of which required the constant and repetitive use of her hands and wrists.

2. In October 1994, Ms. Tatman began experiencing symptoms in her hands and arms. Despite those symptoms, Ms. Tatman continued to work for IBP until June 1995, when she could no longer tolerate the pain. As a result of the work that she performed for IBP, Ms. Tatman sustained repetitive mini-traumas and injured both her hands and arms through her last day of employment with IBP on June 10, 1995.

3. IBP first authorized Ms. Tatman to treat with the company doctor, Dr. Campbell, who x-rayed the right hand and prescribed a brace. Later, Dr. Campbell referred Ms. Tatman to Dr. Delgado, a board certified orthopedic surgeon. Dr. Delgado prescribed cortisone injections, anti-inflammatories, and physical therapy. When he initially saw Ms. Tatman in

November 1994, Dr. Delgado placed her on light duty. Believing that she had tendinitis rather than carpal tunnel syndrome, on February 23, 1995, Dr. Delgado released Ms. Tatman with instructions to work light duty for a month and gradually return to her regular duties.

4. Because she continued to have symptoms, the company next referred Ms. Tatman to Dr. John Moore. After examining her on one occasion, Dr. Moore released Ms. Tatman to return to her regular duties at IBP but told her that she would probably continue to have problems with her hands as long as she worked there.

5. As indicated above, Ms. Tatman continued to work at IBP until June 10, 1995, when she quit because of the pain in her hands and arms. But before terminating, Ms. Tatman asked the company to place her in a different job that would not cause her hands to hurt and ache. In her exit interview, Ms. Tatman advised the company that she was quitting because of her health. Three or four months after she quit, Ms. Tatman returned to IBP and applied for re-employment.

6. Shortly before terminating her employment, Ms. Tatman asked IBP to provide her additional medical treatment. IBP advised that she could see Dr. James N. Glenn but that the company would consider the treatment unauthorized. After seeing Ms. Tatman, the doctor diagnosed tendinitis, and told her to do wrist and elbow exercises. Ms. Tatman next saw Dr. H. R. Bradley who gave her a wrist band. She then consulted Dr. Lynn Ketchum who recommended additional treatment.[1]

7. In January 1996, Ms. Tatman filed a notice with the Division of Workers Compensation that she was requesting Dr. Ketchum as the authorized treating physician. After conducting a preliminary hearing, by Order dated March 19, 1996, Administrative Law Judge Floyd V. Palmer ordered IBP to provide Ms. Tatman the names of three physicians from which she could select a treating physician.

8. As a result of that Order, Ms. Tatman received authorized treatment from Dr. John M. Quinn, who is board certified in plastic reconstructive and hand surgery. The doctor first saw Ms. Tatman in June 1996 and initially diagnosed tendinitis in both wrists, possible carpal tunnel syndrome in both hands, and possible de Quervain's in the right wrist. After a period of conservative treatment, the doctor wrote IBP on August 29, 1996, and recommended surgery as a treatment option. But according to the doctor's notes, IBP would not authorize surgery as that was against company policy. The doctor's office notes read:

> 9-20-96
> Spoke [with] LaRae Smith- she will not pre-auth. surgery, that is their policy (they do not pre-auth. surgery). Surgery would be done & then [when] they

[1] Dr. Ketchum did not testify and, therefore, pursuant to K.S.A. 44-519, his medical report and letters are not considered part of the evidentiary record for purposes of final award.

> receive records- case would be reviewed. Pt. was notfd of this & spoke [with] EQB regarding this.
>
> 10-08-96
> Pt. called- states that her attorney instructed her to go ahead & schedule surgery, IBP should pay for it. Advised pt that we cannot do surgery [without] pre-authorization. Pt. will contact attorney re: court order & WCB

9. On February 27, 1997, Dr. Quinn again wrote IBP and recommended that Ms. Tatman have surgery on both wrists. And on March 3, 1997, the doctor personally telephoned and spoke with an IBP representative. Despite those contacts, according to the doctor's notes, IBP did not authorize surgery until May 7, 1997.

10. On May 23, 1997, Dr. Quinn performed a right endoscopic carpal tunnel release, de Quervain's release, and injected steroids into the right wrist flexor tendons. On June 10, 1997, the doctor performed a left endoscopic carpal tunnel release and injected the left wrist flexor tendons with steroids.

11. According to Dr. Quinn, the typical period of convalescence for someone undergoing the type of surgery that he performed on Ms. Tatman was six to eight weeks following the second surgery. But in his letter to IBP dated June 19, 1997, the doctor stated that he anticipated Ms. Tatman's return to regular duty status by June 30, 1997. The parties did not ask the doctor to explain this discrepancy.

12. For purposes of this litigation, IBP hired Dr. Delgado to examine and evaluate Ms. Tatman to determine both her functional impairment and her loss of ability to perform former job tasks. For that purpose, the doctor saw her on March 11, 1998, and found that she had residual sensory carpal tunnel, tendinitis complaints at both wrists, and lateral epicondylitis at the left elbow. The doctor rated her as having an 8 percent whole body functional impairment as a result of the bilateral upper extremity injuries that she sustained while working for IBP. The doctor testified that Ms. Tatman's rating would be the same according to either the revised third edition or the fourth edition of the AMA Guides to the Evaluation of Permanent Impairment (AMA Guides).

13. Using the task list compiled by Michael Dreiling, the vocational rehabilitation expert that IBP hired to compile a list of Ms. Tatman's former job tasks, Dr. Delgado testified that Ms. Tatman is unable to do five of 23 (or approximately 22 percent) of her former tasks. The doctor believes that Ms. Tatman should avoid vibratory tools; repetitive gripping or pinching; and pushing, pulling, or lifting greater than 25 pounds with both arms or 15 pounds with one arm.

14. Ms. Tatman hired Dr. Pedro A. Murati, who is board certified in physical medicine and rehabilitation, to provide expert medical testimony in this proceeding. The doctor examined Ms. Tatman on December 22, 1997, and diagnosed status post right de Quervain's release, status post bilateral carpal tunnel release, bilateral carpal tunnel syndrome, right de

Quervain's, and mild crepitus in both wrists. At his deposition, the doctor reviewed the task loss analysis prepared by vocational rehabilitation expert Karen Crist Terrill and testified that he agreed with her conclusion that Ms. Tatman is unable to do 13 of 25 (or 52 percent) of her former job tasks. Dr. Murati believes that Ms. Tatman should be restricted, as follows:

> Work restrictions that I would place on this patient would be occasional repetitive hand controls, no heavy grasping, occasional above shoulder work with the left upper extremity, no work more than 18 inches from the body and no use of hooks or knives. Weight limitations of lift/carry/push/pull would be 20 pounds occasional, 10 pounds frequently and 5 pounds constantly.

15. Using the third edition of the AMA Guides, Dr. Murati rated Ms. Tatman as having a 19 percent whole body functional impairment.

16. The Appeals Board is not persuaded that either doctor's task loss opinion is more persuasive than the other. Therefore, the Appeals Board finds that Ms. Tatman's loss of ability to perform former job tasks lies somewhere between 22 and 52 percent. Averaging those two percentages, the Appeals Board finds that Ms. Tatman has a 37 percent task loss.

17. The regular hearing in this case was held in August 1998. At that time, Ms. Tatman had not worked anywhere since leaving IBP in June 1995. As of August 1998, Ms. Tatman's job search had been limited to reapplying at IBP and at two other employers, Hardee's and Newman Hospital, where she had previously worked.

18. Despite her injuries, Ms. Tatman retains the ability to earn $5.50 per hour, or $220 per week. That finding is based upon Karen Terrill's testimony that Ms. Tatman retains the ability to do entry level unskilled work that regularly pays between $5.15 and $6 per hour and Michael Dreiling's testimony that Ms. Tatman can earn approximately $5.34 per hour working in the fast food industry.

19. There was an approximate two-year delay between the time that Ms. Tatman left IBP and when she had her surgeries in May and June 1997. During that two-year period, Ms. Tatman neither worked nor put forth more than a token effort to seek work as she decided to stay home with her children.

CONCLUSIONS OF LAW

1. The Kansas Supreme Court recently held that the appropriate date of accident for repetitive use injuries is the last date that a worker engages in the offending activity.[2] Ms. Tatman sustained repetitive mini-traumas and repetitive use injury to both her hands and wrists through her last day of work for IBP on June 10, 1995.

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[2] Treaster v. Dillon Companies, Inc., Docket No. 80,830 (Kan. 1999).

2. For the date of accident involved in this claim, the Workers Compensation Act provides that an employer is not liable for permanent partial general disability benefits for an injury that "does not disable the employee for a period of at least one week from earning full wages at the work at which the employee is employed."[3]

3. The Appeals Board concludes that Ms. Tatman was disabled for more than one week from *the work at which she was employed.* IBP's argument that Ms. Tatman should be limited to medical benefits only, pursuant to K.S.A. 1994 Supp. 44-501(c) and the Boucher[4] decision, is disingenuous.

First, IBP moved Ms. Tatman to several different accommodated jobs. That, in itself, establishes that Ms. Tatman was disabled from performing *the work at which she was employed.* The purpose of K.S.A. 44-501(c) is to remove certain minor injuries from eligibility for a permanent disability award. In this case, Ms. Tatman was limited and restricted from doing her regular duties at IBP for a period greater than the requisite one week period. Where an injury requires one-handed work, lighter work, or accommodated work for one week or more, the injured worker should be eligible for permanent partial disability benefits if the evidence otherwise establishes permanent injury or impairment.

Second, Ms. Tatman terminated her employment as she was unable to continue working for IBP because of her work-related injuries. That also establishes that she was disabled from performing *the work at which she was employed* for more than seven days.

Third, Ms. Tatman was temporarily and totally disabled from performing any and all work for more than one week following her surgeries in May and June 1997. Again, that satisfies the requirement that Ms. Tatman was disabled from her regular work for more than one week.

4. Because Ms. Tatman has sustained injuries to both arms, she has sustained an "unscheduled" injury and, therefore, her permanent partial general disability benefits are governed by K.S.A. 44-510e. That statute provides:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the

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[3] K.S.A. 44-501(c).

[4] Boucher v. Peerless Products, Inc., 21 Kan. App. 2d 977, 911 P.2d 198 (1996), *rev. denied* 260 Kan. 991 (1996).

> extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of Foulk[5] and Copeland.[6] In Foulk, the Court held that a worker could not avoid the presumption against work disability contained in K.S.A. 1988 Supp. 44-510e by refusing to attempt to perform an accommodated job that paid a comparable wage that the employer had offered. In Copeland, the Court held, for purposes of the wage loss prong of K.S.A. 44-510e, that a worker's post-injury wage would be based upon ability rather than actual wages when the worker failed to make a good faith effort to find appropriate employment after recovering from the injury.

5. As indicated in the findings above, Ms. Tatman has exerted only minimal effort attempting to find a job. Therefore, the Appeals Board concludes that she has failed to make a good faith effort to find appropriate employment. And as a result, a post-injury wage should be imputed. Ms. Tatman retains the ability to earn $220 per week. Comparing that wage to the $325[7] that Ms. Tatman was earning before her injuries, the Appeals Board concludes that Ms. Tatman has a 32 percent difference in pre- and post-injury wages for purposes of the permanent partial general disability formula.

6. As found above, Ms. Tatman has a 37 percent loss in her ability to perform those job tasks that she did in the 15-year period immediately before her work-related injuries. Averaging that 37 percent task loss with the 32 percent wage loss yields a 35 percent permanent partial general disability.

7. The Appeals Board concludes that Ms. Tatman should receive temporary total disability benefits from August 29, 1996, the date that Dr. Quinn determined that Ms. Tatman needed surgery and notified IBP, through June 30, 1997, the date that Dr. Quinn's records indicate that Ms. Tatman could return to regular duties. Therefore, Ms. Tatman is entitled to receive 43.71 weeks of temporary total disability benefits. The Appeals Board declines to award temporary total disability benefits for the remainder of the period requested by Ms. Tatman as the evidence fails to establish that she was temporarily and totally disabled at that time. Instead, the record indicates that Ms. Tatman more probably than not could have performed light duty work but chose not to as she preferred to stay home with her children.

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[5] Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[6] Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[7] At oral argument before the Appeals Board, the parties did not contest Judge Avery's finding that the average weekly wage was $325. Therefore, the Appeals Board adopts that finding as its own.

AWARD

WHEREFORE, the Appeals Board modifies the December 24, 1998 Award as follows:

Karen Tatman is granted compensation from IBP, Inc., for a June 10, 1995 accident and resulting 35 percent permanent partial general disability. Based upon an average weekly wage of $325, Ms. Tatman is entitled to receive 43.71 weeks of temporary total disability benefits at $216.68 per week, or $9,471.08, followed by 135.20 weeks of permanent partial disability benefits at $216.68 per week, or $29,295.14, for a 35 percent permanent partial general disability and making a total award of $38,766.22, which is all due and owing less any amounts previously paid.

The Appeals Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of November 1999.

BOARD MEMBER PRO TEM

BOARD MEMBER

BOARD MEMBER

c: Michael C. Helbert, Emporia, KS
Jennifer L. Hoelker, Dakota City, NE
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Director